

June 7, 2012

Ashlee N. Titus
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455 Capitol Mall, Suite 600
Sacramento, CA 95814

Re: Your Request for Advice
Our File No. A-12-081

Dear Ms. Titus:

This letter responds to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the “Act”)¹ and is based on the facts presented. The Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Please note that our advice is based solely on the provisions of the Act. We therefore offer no opinion on the application, if any, of other conflict-of-interest laws such as common law conflict of interest.

QUESTION

Does the Act prohibit Ms. Robinette, a board member of the Cambria Community Services District (the “District”), who owns undeveloped property in the District and is on a waiting list for a water connection, from participating in decisions to (a) lift a moratorium on new water connections and activate the waiting list, or (b) explore alternative water sources for the District?

CONCLUSION

No. The financial effect of the decisions on Ms. Robinette’s real property is indistinguishable from the effect on the public generally.

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

FACTS

Cambria is not a municipal corporation, but is an unincorporated area within San Luis Obispo County. Cambria is home to approximately 6,400 residents, with a substantial tourist and secondary home population. The District is an independent special district with jurisdiction over all of Cambria that provides sewer, water, wastewater, fire protection, lighting, refuse, parks, recreation and open space services and management. The District is governed by a five-member board of directors elected at large to four-year staggered terms.

A major issue that has long confronted the District is the development of vacant lots and the availability of water connections for such development. The maximum capacity for water connections in Cambria is 4,650. There are approximately 3,900 developed lots with water connections. There are 665 property owners of undeveloped residential lots on a waiting list for a water connection. Before a property owner can develop his or her property, the board would have to lift a moratorium on new water connections and the owner's number would have to come up on the waiting list, unless the owner can swap water connections between properties, as described below.

One possible governmental decision that may arise in the future is the lifting of the moratorium and activation of the waiting list. In accordance with the county's Growth Management Ordinance, water conservation measures and other considerations, the District could vote to authorize between 8-12 water connections per year to property owners on the waiting list.

Ms. Robinette owns a vacant lot within the District and is number 136 on the waiting list. At the rate of eight water connections per year, Ms. Robinette's number would come up in 17 years. At the rate of 12 per year, Ms. Robinette's number would come up in 12 years.

An alternative to waiting for the moratorium to be lifted is to swap an existing water connection from a developed lot to an undeveloped lot. For instance, by purchasing a property with a building and a water connection, tearing down the building, and then transferring the water connection to the undeveloped lot; the wait list number then transfers to the property in which an existing building was demolished. Ms. Robinette was able to purchase such a property and build a home on the previously vacant lot by swapping the water connection and the wait list number between her two properties.

Other future decisions that may come before the board include the construction of a desalination plant and identification of alternative water sources for the community. Neither of these conceptual decisions has been developed at this time.

Ms. Robinette requests formal advice assessing whether or not she has a conflict of interest in making or participating in making a decision to activate the water connection waiting list or any possible decisions relating to additional water sources for the community.

ANALYSIS

The Act's conflict-of-interest provisions ensure that public officials will "perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them." (Section 81001(b).) Section 87100 prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest.

The Commission has adopted an eight-step standard analysis for deciding whether an official has a disqualifying conflict of interest. (Regulation 18700(b).) The general rule, however, is that a conflict of interest exists whenever a public official makes a governmental decision that has a reasonably foreseeable material financial effect on one or more of his or her economic interests.

Steps 1 and 2. Is Ms. Robinette a "public official" within the meaning of Section 87100 and will she be making, participating in making or influencing a governmental decision?

The Act's conflict-of-interest provisions apply only to "public officials." (Sections 87100, 87103; Regulation 18700(b)(1).) A "public official" is "every member, officer, employee or consultant of a state or local government agency." (Section 82048.) As a member of the Board of Directors of the District, Ms. Robinette is a public official within the meaning of the Act.

Voting on or participating in discussions regarding the activation of the waiting list and the alternative water sources would be making and participating in governmental decisions. (Regulations 18702.1 and 18702.2.)

Step 3. What are Ms. Robinette's economic interests?

The Act's conflict-of-interest provisions apply only to conflicts of interest arising from certain enumerated economic interests. These economic interests are described in Section 87103 and Regulations 18703-18703.5, including:

- A public official has an economic interest in a business entity in which he or she has a direct or indirect investment of \$2,000 or more. (Section 87103(a); Regulation 18703.1(a).)
- A public official has an economic interest in a business entity in which he or she is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d); Regulation 18703.1(b).)
- A public official has an economic interest in real property in which he or she has a direct or indirect interest of \$2,000 or more. (Section 87103(b); Regulation 18703.2.)

- An official has an economic interest in any source of income, including promised income, totaling \$500 or more within 12 months prior to the decision. (Section 87103(c); Regulation 18703.3.)
- A public official has an economic interest in any source of gifts to him or her if the gifts total \$420 or more within 12 months prior to the decision. (Section 87103(e); Regulation 18703.4.)

Real Property:

Your question concerns a vacant lot owned by Ms. Robinette that is located within the District. Therefore, Ms. Robinette has an economic interest in real property.

Personal Financial Effects:

A public official is considered to always have an economic interest in his or her personal finances. However, a financial effect on the value of real property owned directly or indirectly by a public official is not considered a separate financial effect on the official's personal finances and would not be analyzed separately under the "personal financial effects" rule. (Regulation 18705.5 (a).) Accordingly, the personal financial effects rule does not appear to apply to Ms. Robinette's circumstances and we will not discuss it further.

Step 4: Is the economic interest directly or indirectly involved in the governmental decision?

"In order to determine if a governmental decision's reasonably foreseeable financial effect on a given economic interest is material, it must first be determined if the official's economic interest is directly involved or indirectly involved in the governmental decision." (Regulation 18704(a).) For governmental decisions that affect real property interests, the standards set forth in Regulation 18704.2 apply. (Regulation 18704(a)(2).)

Decision to activate the waiting list

Under Regulation 18704.2(a)(1), real property that is located in or within 500 feet of the boundaries (or the proposed boundaries) of the property which is the subject of the governmental decision is directly involved. Ms. Robinette is on the list. Therefore, Ms. Robinette's real property is directly involved in the decision.

Decisions regarding new water sources

You state that the Board may, in the future, consider construction of a desalination plant or other alternative water sources for the entire community. You indicate that there are no specific governmental decisions facing the District with respect to alternative water sources,

other than conceptual decisions that have not yet been developed. At this stage, it appears the decisions are general in nature and involve exploring various alternatives. Without more details or a more developed proposal, we cannot advise further.

Step 5. What is the applicable materiality standard?

For real property directly involved in a governmental decision, any financial effect, even “one penny,” is presumed to be material. (Regulation 18705.2(a)(1).) This presumption may be rebutted by proof that it is not reasonably foreseeable that the governmental decision will have any financial effect on the real property.

Step 6. Is it reasonably foreseeable that the financial effect of the Board’s decisions on Ms. Robinette’s economic interests will meet the applicable materiality standard?

An effect is considered “reasonably foreseeable” if the effect is “substantially likely.” (Regulation 18706; *In re Thorner* (1975) 1 FPPC Ops. 198.) 198.) A financial effect need not be a certainty to be considered reasonably foreseeable. On the other hand, if an effect is only a mere possibility, it is not reasonably foreseeable.

You state that obtaining a water connection would increase the value of Ms. Robinette’s property. Therefore, under the one-penny rule, the decision will have a reasonably foreseeable material financial effect on her economic interest in real property.

Step 7. Public generally exception

Even if a material financial effect of a governmental decision on a public official’s economic interest is reasonably foreseeable, the public official is not disqualified from participating in the decision if the financial effect is indistinguishable from the manner in which the decision will affect the public generally. (Regulation 18707(a).) Regulation 18707(b) sets forth a four-step process to determine whether the effect of a decision is distinguishable (or not) from the effect on the public generally:

(1) Step One: Identify each specific person or real property (economic interest) that is materially affected by the governmental decision.

All real property on the waiting list is at issue.

(2) Step Two: For each person or real property identified in Step One, determine the applicable “significant segment” rule according to the provisions of Regulation 18707.1(b). Regulation 18707.9 provides that the effect of a governmental decision on a public official’s real property interest is indistinguishable from the effect on the public generally if 5,000, or 10% or more, of all property owners- or homeowners in the jurisdiction are affected by the decision “in substantially the same manner” as it will affect the public official.

For decisions that affect Ms. Robinettes's real property, "significant segment" is defined as 10% or more of all property owners or all residential property owners in Cambria, or 5,000 property owners or residential property owners in Cambria.

(3) Step Three: Determine if the significant segment is affected by the governmental decision as set forth in the applicable "significant segment" rule.

You state that Cambria has a residential build-out capacity of 4,650 and that 665 properties are on the water connection waiting list. Even if we were to use the most conservative assumption that no owners own more than one residential property, 14% of Cambria's residential property owners would be affected by the decision. Accordingly, the 10% threshold is met.

(4) Step Four: Following the provisions of Regulation 18707.1(b)(2), determine if the person or real property identified in Step One is affected by the governmental decision in "substantially the same manner" as other persons or real property in the applicable significant segment.

This step requires Ms. Robinette to determine the financial effects on her real property and measure these effects against the financial effects on the public generally. A financial effect is measured in the over-all dollar amount (not percentage) of the increase or decrease in the value of the property. The inquiry must focus on indentifying whether the minimum threshold of the significant segment identified is affected in substantially the same manner.

Many factors play a role in determining whether or not economic interests will be financially affected in a manner substantially the same as the identified significant segment including, but not limited to: the magnitude of the financial effect; lot size; square footage of building space; physical characteristics or permitted use of the property; location; neighborhood; current fair market value; and development potential or income producing potential of the property. (Regulation 18707.1(b)(2)(A).)

Magnitude and current market value:

You state that the fair market value of Ms. Robinette's property of approximately \$68,000 is probably less than other properties on the waiting list.

Lot size and square footage of building space:

You state that the property, at 3,500 square feet, is the smallest buildable size under the District's building standards. In addition, local ordinances limit new residential structures to 2,100 square feet with a carport, which is modest compared with existing Cambria homes.

Physical characteristics, location and neighborhood:

The property does not have any special or unique physical characteristics that distinguish it from other properties on the waiting list. Its location does not offer views of the ocean, open space or hills. It is located in a mixed, lower socio-economic neighborhood that includes some multi-family occupancies and older construction. Many other undeveloped residential lots on the waiting list are larger, offer ocean or other desirable views, or are located in more upscale neighborhoods and, therefore, would be expected to increase in value a great deal more than Ms. Robinette's property.

Development or income producing potential:

Development of the lot is limited by the District's building standards under which the lot is the smallest buildable size. Once developed, the property is unlikely to be used to produce income because, under local ordinances that limit the use of property for rental, Ms. Robinette's property would not be eligible for rental.

In light of the above facts, the impact of a decision to activate the water connection waiting list on the value of Ms. Robinette's real property is not distinguishable from the effect on the public generally. Accordingly, Ms. Robinette does not have a disqualifying conflict of interest in the decision to activate the waiting list.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Valentina Joyce
Counsel, Legal Division

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